Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 1288 of 2001
(Old No. 986 of 1990)

1. Devendra Singh @ Devan (Since Deceased)
2. Madan Singh
Both Sons of Puran Singh
R/o Devala Talla,
P.S. Haldwani, District Nainital.

…. Appellants

Versus

The State ….. Respondent

Mr. R.S. Sammal, Advocate for the appellant.
Mr. Lalit Verma, Asstt. Government Advocate for the respondent State.

Coram: Hon'ble Prafulla C. Pant, J.
Hon'ble Dharam Veer, J.

[Per Hon'ble Prafulla C. Pant, J.]

This appeal, preferred under Section 374(2) of the code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.), is directed against the judgment and order dated 02.05.1990, passed by learned Sessions Judge, Nainital, in Sessions trial No. 236 of 1986, whereby the accused/ appellants Devendra Singh and Madan Singh have been convicted under Section 302 read with Section 34 and under Section 201 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred as I.P.C.), and each one of them has been sentenced to imprisonment for life under Section 302 read with Section 34 of I.P.C., and three years

rigorous imprisonment and also to pay fine of Rs. 1,000/- under Section 201 read with Section 34 of I.P.C. It is directed by the trial court that in default of payment of fine, the defaulter convict shall further undergo six months rigorous imprisonment. Both the sentences were directed to run concurrently by the trial court. (During the pendency of appeal appellant Devendra Singh has died and his appeal stood abated).

2) Heard learned counsel for the parties and perused the entire evidence on record.

3) Prosecution story, in brief, is that on 05.08.1986, at about 06:00 P.M., P.W. 1 Abdul Aziz along with Abdul Salam (deceased) were sitting outside latter's house in village Bagjala Payaya Gaulapar within the territorial limits of P.S. Haldwani. P.W. 2 Abdual Rasid, P.W. 3 Abdul Majid (real brother of the deceased) and P.W. 4 Pratap Singh were also present there. Accused / appellant Devendra Singh, armed with 'DARAT' (sickle) along with his elder brother aqccsued / appellant Madan Singh, armed with 'KUDAL' (one sided pick axe), came there and told Abdul Salam That they will teach him lesson for demanding money from them. According to the prosecution, thereafter, both the accused/appellants with the weapons armed, assaulted Abdul Salam, who received injuries and as a result of which he died. Accused / appellants Madan Singh and Devendra Singh, thereafter threw the dead body in a canal and ran away. P.W. 1 Abdul Aziz got lodged the first information report (Ext. A –1) with police station Haldwani, on 05.08.1986, at about 9:20 P.M. P.W. 7 Head

Constable Sultan Singh prepared the check report (Ext. A –12) and P.W. 9 Inspector Ramcharan Singh, in-charge of the police station, started investigation. A police team consisting of P.W. 6 Sub Inspector Vishram Singh along with Sub Inspector Omraj Singh and Constable Keshar Singh proceeded to the spot and prepared the inquest report (Ext. A –5) of the dead body, between 10:30 P.M. to 11:45 P.M., on the very day i.e. 05.08.1986. The dead body was found by the police party lying near a canal. The police also got prepared police form No. 33 (Ex. A –6); Police form No. 13 (Ext. A –7); sketch of the dead body (Ext. A –8) and letter (Ext. A –9) addressed to the Chief Medical Officer, requesting him for postmortem examination of the dead body. The dead body in a sealed condition was sent for postmortem examination. P.W. 8 Dr. R.P. Pande conducted the postmortem examination on 06.08.1986, and prepared the autopsy report (Ext. A –14). After preparing site plan, interrogating the witnesses, and on completion of the investigation, charge sheet (Ext. A –18) was submitted by P.W. 9 Ramcharan Singh, Investigating Officer, against both the accused Devendra Singh and Madan Singh.

4) The Magistrate concerned on receipt of the charge sheet, appears to have committed the case to the court of Sessions, for trial after giving necessary copies to both the accused, as required under Section 207 of the Cr.P.C. learned Sessions Judge, Nainital after hearing the prosecution and the defence, framed charge of offences punishable under Section 302 read with Section 34 and that of one punishable under Section 201 read with Section 34

of the I.P.C. against both the accused, who pleaded not guilty and claimed to be tried, On this, prosecution got examined P.W. 1 Abdul Aziz, informant (declared hostile); P.W. 2 Abdul Rasid (cousin of the deceased); P.W. 3 Abdul Majid (real brother of the deceased); P.W. 4 Pratap Singh, an alleged eyewitness (declared hostile): P.W. 5 Constable Keshar Singh (who took the dead body in a sealed cover for postmortem examination); P.W. 6 Sub Inspector Vishram Singh(witness of preparation of inquest report); P.W. 7 Head Constable Sultan Singh (who prepared the check report); P.W. 8 Dr. R.P. Pande (who conducted the autopsy) and P.W. 9 Ramcharan Singh (Investigating Officer, who investigated the crime). The oral and documentary evidence, adduced by the prosecution, was put to the two accused under Section 313 of Cr.P.C., in reply to which they alleged the same to be false. No evidence in defence was given on behalf of the accused. The trial court, after hearing the prosecution and the defence, found both the accused Devendra Singh and Madan Singh guilty of charge of offences punishable under Section 302/34 and one punishable under Section 201/34 of I.P.C. After hearing them on sentence, each one of the convict was sentenced to imprisonment for life under Section 302/34 of I.P.C. and to rigorous imprisonment for three years under Section 201/34 of I.P.C. The convicts were further directed to pay fine of Rs. 1.000/-, under Section 201 / 34 of I.P.C., in default of payment of which they were directed to undergo further six months rigorous imprisonment. Aggrieved by the judgment and order dated 02.05.1990, the convicts preferred this appeal before the

Allahabad High Court in the year 1990, from where it is received by transfer to this Court under Section 35 of the U.P. Re-organization Act, 2000 for its disposal.

5) Before further discussions, it is pertinent to mention here, the ante mortem injuries found on the person of the deceased, at the time of postmortem examination, as observed in Ext. A –14, which are being reproduced as under:

1" ***Multiple abraded contusion on the top and back of head with lacerated wound of 3 cm X 2 cm on the back with one fracture.***

2. ***Lacerated wound of 4 cm X 1.5 cm on the left side forehead.***
3. ***Contusion on the right side of forehead.***
4. ***Abrasion on the back of both hands (palm).***
5. ***Contusion with multiple abrasions on both knee joints.***
6. ***Bleeding from both nose and left ear was present."***

Skull bone was also found fractured.

In connection with the injury Nos. 1 and 2, on internal examination, P.W. 8 Dr. R.P. Pande found frontal and occipital bones fractured with the bone of the skull and base fractured. Membranes were found lacerated and congested. In the opinion of the Medical Officer, the cause of death was shock and haemorrhage.

6) As per the prosecution story, there are four eyewitnesses of the incident. P.W. 1 Abdul Aziz; P.W. 2 Abdul Rasid; P.W. 3 Abdul Majid and P.W. 4 Pratap

Singh. P.W. 1 Abdul Aziz, informant and eyewitness, did not support the prosecution story and stated that he did not witnessed the commission of crime and the accused / appellants did not cause injuries in his presence. This witness was got declared hostile. P.W. 4 Pratap Singh, who is said to be servant of the deceased, when examined before the court, did not support the prosecution story. He has stated that he did not witness accused/ appellants committing murder of the deceased. This witness was also got declared hostile. Now, there remain ocular evidence of only remaining two witnesses i.e. P.W. 2 Abdul Rasid and P.W. 3 Abdul Majid. Both of these witnesses are related to the deceased. P.W. 2 Abdul Rasid is cousin of the deceased. and P.W. 3 Abdul Majid is real brother of the deceased. No doubt, oral testimony of the witnesses cannot be discarded only for the reason that they happen to be relatives of the deceased, but, if there presence at the time of occurrence appears to be doubtful, then certainly it cannot be said that they are the reliable witnesses. Undoubtedly, these two witnesses have supported the prosecution story, but addresses given by them itself shows that P.W. 2 Abdul Rasid is resident of Line No. 7, Azad Nagar, Haldwani, while P.W. 3 Abdul Majid is resident of Line No. 1, Azad Nagar, Haldwani, as such, none of these witnesses are resident of the village where the incident had taken place. Not only this, each of these eyewitnesses P.W. 2 Abdul Rasid and P.W. 3 Abdul Majid disclosed different reasons for being present on 05.08.1986, at about 06:00-6:30 P.M., in the village where the incident had taken

Place. Therefore, these witnesses are not only relatives but also the chance witnesses.

7) In our opinion, in the above circumstances the truthfulness of the testimony of the two witnesses P.W. 2 Abdul Rasid and P.W. 3 Abdul Majid, is doubtful. Not only this, the two witnesses are close relatives of the deceased, but also chance witnesses, who disclose different reasons for reaching in the village where the incident had taken place. The reasonable doubt in the prosecution story as to the manner in which the offence is said to have been committed by the accused / appellant further appears to be doubtful on the ground that neither there is any incised injury found on the person of the deceased, nor is there any punctured wound. With 'DARAT' (sickle) in a normal course, if assaulted, a person would receive incised wound. Similarly, if assaulted with 'KUDAL' (one sided pick axe-grub hoe), in normal course there should have been a punctured wound. From the facts and circumstances, established on the record, it cannot be ruled out that the deceased might have fallen in the canal, which is built of stones of rocks and the injuries might have been received by him due to his fall in the canal. Prosecution story itself says the dead body was recovered from canal. It has come on the record that canal was made of stones of rocks.

8) For the reasons as discussed above, we are of the view that the prosecution has not been successful in proving the charge beyond reasonable doubt against either of the accused / appellants. As such, both of them are entitled to the benefit of reasonable doubt. Accordingly,

we hold that the charges framed against the accused / appellants are not proved beyond reasonable doubt and they deserve to be acquitted. Therefore, the appeal is allowed. Impugned judgment and order dated 02.05.1990, passed by trial court in Sessions Trial No. 236 of 1986, is set aside. Accused / appellant Madan Singh is acquitted of the charge of offences punishable under Section 302 / 34 of I.P.C. and the one under Section 201 / 34 of I.P.C. He is on bail. He need not to surrender. The conviction and sentence awarded against them by the trial court is set aside. (The appeal of accused/ appellant Devendra Singh stand abated due to his death during the pendency of the appeal). The lower court record be send back to the court concerned.

(Dharam Veer, J.) **(Prafulla C. Pant, J.)**

Dt. March 06, 2007
H. Negi